In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 406

YOKOHAMA SPECIE BANK, LTD.
(a corporation),
Petitioner,

vs.

DR. HU SHIH, The Ambassador of the Republic of China to the United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit,
and
BRIEF IN SUPPORT THEREOF.

CARROLL SINGLE,
Merchants Exchange Building, San Francisco, California,
Counsel for Petitioner.

STANLEY J. COOK,
Merchants Exchange Building, San Francisco, California,
Of Counsel.

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To the Honorable Charles Evans Hughes, Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

Yokohama Specie Bank, Ltd., a Japanese corporation, herewith presents its petition for a writ of certiorari to review a decree of the United States Circuit

Court of Appeals for the Ninth Circuit, sitting in admiralty, and in that connection respectfully shows to this Honorable Court:

STATEMENT OF MATTERS INVOLVED.

This cause involves the question of how *in rem* jurisdiction is obtained in admiralty and under what circumstances governmental immunity from that jurisdiction can be claimed by foreign nations for vessels owned by them. It also involves the question of whether such a claim of governmental immunity can displace the jurisdiction of the District Court where the foreign government did not acquire title to the vessel until after the admiralty proceedings had been commenced.

The facts will be stated at greater length in the supporting brief annexed to this petition. Here it will suffice to summarize them as follows:

Libelant, owner of a cargo of scrap iron on a Chinese steamer lying in San Francisco Bay, filed a libel *in rem* against that cargo to recover possession thereof (R. 2-7). A monition (R. 7-10) issued in due course, and a "formal seizure" was made. That is, the Deputy Marshal boarded the vessel, tacked a notice of seizure to the cabin wall, and served a copy of libel and monition upon the highest ranking officer on board (R. 84). In addition, an interpreter hired by libelant read the libel in Chinese to the ship's officer. No "keeper" or representative of the Marshal was left on board, and the Deputy returned to shore after making his service.

Three days after this had been done, the Chinese Government, through its Military Council, expropriated the vessel (which had been owned by a Chinese private corporation) and ordered the Chinese Consul-General in San Francisco to take possession of the ship. This the Consul did, just four days after service of process in the instant libel. These facts are admitted by libelant-petitioner.

Thereafter the Ambassador of the Republic of China to the United States filed a petition in intervention (R. 18-21), and claimed governmental immunity for the vessel from any order of the District Court controlling her movements (the libel prayed that the Court make any order necessary to facilitate discharge of the cargo, such as compelling the vessel to moor at a wharf, to open her hatches, and to allow the use of her winches to unload the scrap).

After taking proof of the fact of expropriation, the District Court granted the plea of governmental immunity for the vessel and dismissed the libel in so far as it sought to compel the ship to permit discharge of the cargo (R. 325).

The Circuit Court of Appeals affirmed this decree on appeal (R. 346-53), holding that the service of process prior to the expropriation of the vessel had been insufficient to acquire *in rem* jurisdiction of ship or cargo, and that the Republic of China was entitled to claim governmental immunity for the vessel from any order controlling her movements to permit discharge of the cargo.

This petition seeks a review of that decision by the Circuit Court on writ of certiorari.

JURISDICTION.

This is an admiralty case which was begun in the United States District Court for the Northern District of California and was appealed to the United States Circuit Court of Appeals for the Ninth Circuit. The jurisdiction of this Honorable Court to issue its writ of certiorari is invoked under Article III, Section 2 of the Constitution of the United States of America, and under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stats. 938; Title 28 U.S. Code § 347). (A complete statement of the jurisdiction of the lower courts will be made in the supporting brief attached hereto.)

The decree of the Circuit Court was entered July 12, 1940 (R. 353). This petition will be filed on or before September 10, 1940, or well within the three months allowed by Section 240 of the Judicial Code, just cited. A stay of the mandate of the Circuit Court until final disposition by this Court has been obtained (R. 354).

QUESTIONS PRESENTED.

1. Where the admiralty jurisdiction of the District Court has attached to the *res* in an *in rem* proceeding, can a foreign government thereafter acquire title to

the *res,* and, by claiming governmental immunity from suit, divest the District Court of jurisdiction over the *res?*

2. In an admiralty action *in rem* against the cargo of a vessel, brought to secure possession of that cargo, where the libel and monition name, as respondent, a number of tons of scrap iron aboard the vessel, designating it by name, and a deputy United States Marshal boards that vessel while the cargo is in her holds, reads the libel to officers and crew, serves copies of the libel and monition upon the highest ranking officer on board, and nails a notice of seizure in a conspicuous place upon the ship,

(a) Has valid *in rem* jurisdiction been acquired over the cargo named as respondent in the libel?

(b) Has valid *in rem* jurisdiction been obtained over the vessel, sufficient to allow the District Court to make any necessary order controlling the movements of the ship in order to facilitate the discharge of the cargo (such as compelling her to proceed to and moor at a wharf, to open her hatches, and to allow access to stevedores and the use of her winches to unload her cargo)?

3. Where libelant, in an action *in rem* against cargo on a named vessel, prays merely for possession of the cargo, and the libel seeks only to compel the vessel to moor at a wharf and permit discharge of the cargo, and where a foreign government, through its diplomatic representative, asserts title to the vessel

and not to the cargo, can the plea of governmental immunity for the vessel prevent the District Court from making the necessary orders to compel the vessel to allow the discharge of her cargo?

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI.

1. The question here involved, of the immunity from the *in rem* jurisdiction of the United States admiralty courts of vessels owned by foreign governments, is a federal question of great importance to all shipping and maritime interests today. This is particularly true of the question as to the *extent* of such immunity and *when* it may be asserted.

2. The decision of the Circuit Court of Appeals holds that a "formal seizure" (i. e., service of process on the master and tacking of notice on the ship) does not give the District Court jurisdiction of the *res*, and that actual control by a keeper left continuously on board is necessary to establish jurisdiction.

(a) This question is of vital interest and importance to the admiralty bench and bar of this Country, and has never been definitely passed upon by the Supreme Court. The admiralty bar has generally understood that such a seizure is valid.

(b) This decision by the Circuit Court is in direct conflict with decisions in other Federal Courts, such as *Snow v. 180 Tons of Scrap Iron,*

11 Fed. 517 (D.R.I.); *250 Tons of Salt,* 5 Fed. 216 (S.D.N.Y.); *Flaherty v. Doane,* 1 Low. 148, 9 F. Cas. No. 4849 (D. Mass.); *Jorgenson v. 3173 Casks of Cement,* 40 Fed. 606 (E.D.N.Y.); *The Whippoorwill,* 52 Fed. (2d) 985 (D. Md.).

3. The decision of the Circuit Court allows a foreign government to oust a United States District Court from *in rem* admiralty jurisdiction by seizing and expropriating a privately owned vessel after action has begun against its cargo and process has been served. This is an extension, far beyond all past limits, of the doctrine of sovereign immunity, and finds no justification in precedent or in the reasons which induced the acceptance of the doctrine.

4. The decision of the Circuit Court also goes beyond the past limits of the doctrine of sovereign immunity in applying it to a case where no claim is asserted against the foreign government or its property, and no dispossession of that government or sale or seizure of its property is sought or required.

5. This case involves, not simply a dispute between a Japanese corporation and the Republic of China, but a conflict, as to jurisdiction, between the United States District Court and the Republic of China. We submit that the parties and issues are such that a decision on the merits by the Supreme Court is both advisable and necessary.

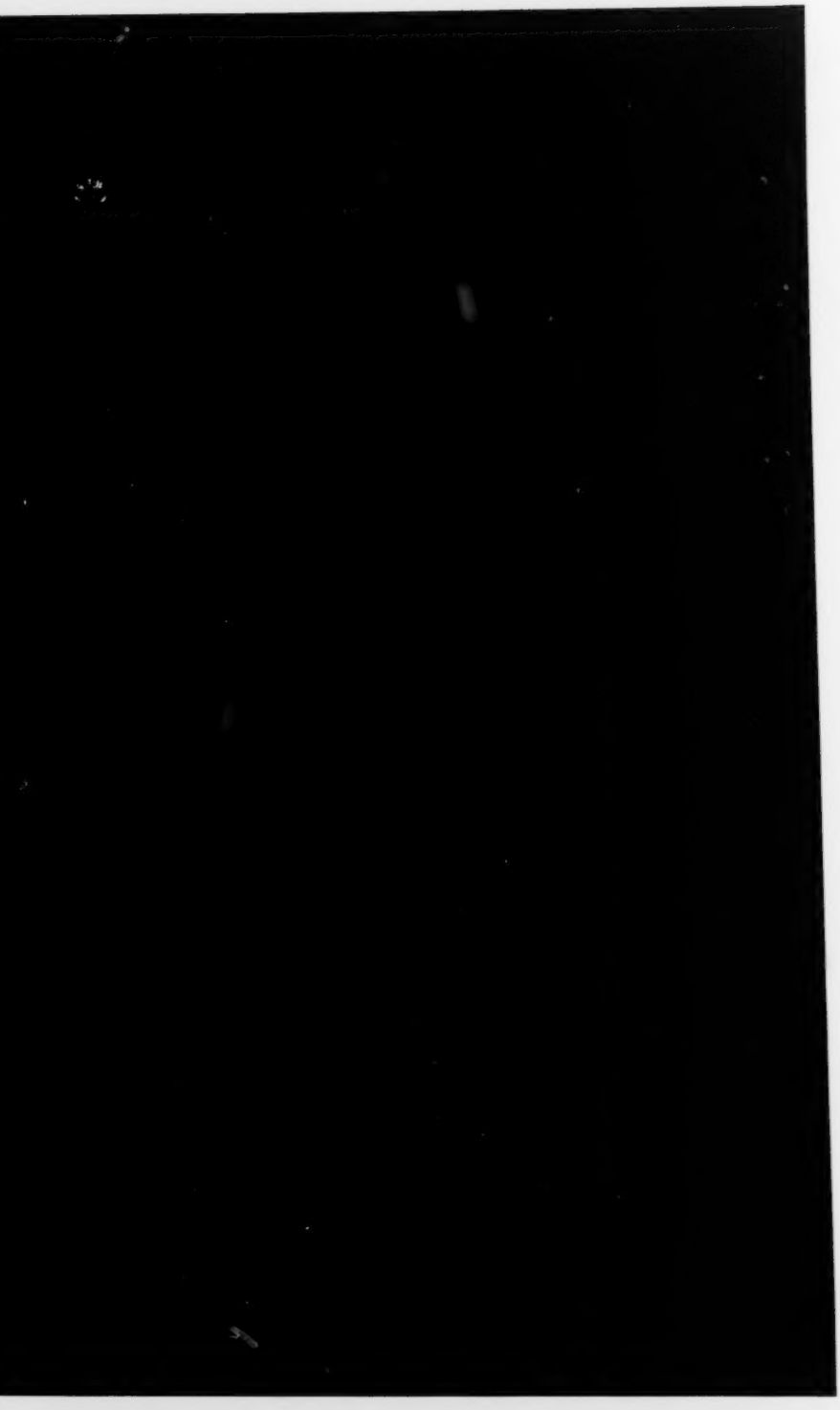
Wherefore, petitioner prays that a writ of certiorari issue to the United States Circuit Court of

Appeals for the Ninth Circuit, and submits its brief, hereto attached, in support of this petition.

Dated, San Francisco, California,
September 3, 1940.

Respectfully submitted,
CARROLL SINGLE,
Counsel for Petitioner.

STANLEY J. COOK,
Of Counsel,



PETITIONER'S

BRIEF

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PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURTS BELOW.

The decree of the District Court was rendered June 30, 1939 (R. 325-6), and is not reported in any printed publication. No opinion as such was ever given, the decree being based upon written findings of fact and conclusions of law signed June 30, 1939. These may be found on pages 318-323 of the record.

The opinion of the Circuit Court of Appeals affirming the decree of the District Court, was entered July 12, 1940, and appears on pages 346-352 of the record. It will appear in the next advance sheets in 113 F. (2d) at page 329. No petition for rehearing was filed in the Circuit Court of Appeals.

II.

JURISDICTION.

This was a proceeding *in rem* in admiralty to recover possession of the cargo of an ocean-going vessel lying afloat in San Francisco Bay. The admiralty jurisdiction of the Federal Courts is granted in the United States Constitution, Article III, section 2(1) and the admiralty jurisdiction of the District Court is based upon section 24 of the Judicial Code, Title 28 U.S. Code, § 41 (33).

That a libel *in rem* against cargo to recover possession thereof may be maintained on the admiralty side of the Federal Courts is unanimously held in the decisions. *528 Pieces of Mahogany,* 9 F. Cas. No. 4845; *The Blairmore* I, 10 F. (2d) 35; *New England Co. v. One Model D Trawler,* 5 F. Supp. 627; *Benedict on Admiralty* (5th Ed.), Vol. I, p. 102; 2 *C. J. S.* 154-5.

Appeal was taken to the Circuit Court of Appeals under section 128 of the Judicial Code, Title 28 U.S. Code 225, and its decree was entered and filed July 12, 1940 (R. 353).

Jurisdiction of this Court is invoked under section 240 of the Judicial Code, Title 28 U.S. Code § 347. This brief and petition will have been filed with the Clerk of this Court within the three month period allowed by the statute last cited for application for writs of certiorari.

III.

STATEMENT OF THE CASE.

In July of 1937 the American Steamer Edna Christensen was sold by her American owners to a Chinese corporation, and the United States Maritime Commission duly approved the sale and transfer of registry of the vessel from the American to the Chinese flag (R. 119-20). Actual bill of sale was executed August 27, 1937 (R. 112-117).

A provisional Chinese registry was issued by the Chinese Consul-General in San Francisco on November 24, 1937 (R. 167-170) and the vessel's American registry was cancelled of record on January 24, 1938 (R. 109).

Pending these formalities, the new owner took possession of the vessel, changed her name to the Kwang Yuan, and, on July 27, 1937, executed a charter party to carry a full cargo of scrap iron from Oakland, California, to Japan (R. 66-70).

Pursuant to this charter party, about 2100 long tons of scrap iron were loaded by October 6, 1937, and two bills of lading were issued (R. 72-81). These bills of

lading were duly sold and transferred to libelant, the Yokohama Specie Bank, which became and ever since has been the owner of the scrap iron, as the District Court found (R. 319).

Although freight was paid upon loading (R. 74, 79), the Chinese Consul-General refused to allow the vessel to clear (R. 206; 40-41), and the vessel simply lay at anchor in San Francisco Bay without attempting to begin the voyage to Japan.

On April 22, 1938, redelivery of the cargo having been demanded and refused, the Bank filed a libel *in rem* on the admiralty side of the District Court in San Francisco to recover possession of the cargo (R. 2-7). This libel named as respondent "2100 tons of melting scrap on board the SS 'Edna Christensen' " and, after setting out the execution of the charter party, the loading of cargo, payment of freight and issuance of bills of lading, prayed for return of the cargo, for the usual process against the scrap, and "that all persons having or claiming to have any right, title or interest therein may be cited to appear and answer on oath * * *" (R. 5).

The libel also prayed:

> "3. That this Honorable Court make such appropriate order or orders as to the movement of said steamship 'Edna Christensen' to facilitate the discharge of said 2100 tons of melting scrap onto the dock, into lighters and/or other vessel or vessels, or such movement of said vessel as shall be required to accomplish the effective and economical delivery of possession of said merchandise to

libelant, subject to the giving by libelant of such bond or bonds to the United States Marshal for said district, in such form and amount as may appear to the court to be proper in the premises" (R. 6).

Monition was issued April 22, 1938 (R. 7-9), naming as respondent "2100 tons of Melting Scrap on board the SS 'Edna Christensen' ". This was served by a deputy United States Marshal on April 23, 1938, in the following manner:

He boarded the vessel with an interpreter hired by libelant. He handed a copy of the libel and monition to the second officer, who was the highest ranking officer then on board, and tacked a notice of seizure on the cabin-wall of the vessel (R. 84). The interpreter read the libel to the second officer in Chinese (R. 84), and he and the deputy Marshal then left the ship.

Three days later, on April 26, 1938, the Chinese Government expropriated the vessel and ordered the Chinese Consul-General in San Francisco to take possession of the ship on behalf of the Government. This the Consul did on April 27, 1938 (R. 320).

On May 20, 1938, the Hon. Chengting T. Wang, Ambassador of the Republic of China to the United States, filed a petition in intervention, setting up the title of the Chinese Government to the vessel (but not asserting any interest in the cargo) and claiming governmental immunity for the vessel from any order of the Court compelling the vessel to move or open hatches or otherwise facilitate the discharge of the cargo (R. 18-21).

The District Court granted the claim of governmental immunity, refused to make any order controlling the movements of the vessel, and entered a decree dismissing the libel "in so far as it prays for an order controlling the movements of said vessel or the use of its equipment" (R. 325-6).

Since loading in 1937 the vessel has simply lain at anchor in San Francisco Bay without attempting to move, and she lies there today.

The decree of the District Court was affirmed on appeal by the Circuit Court of Appeals, and this latter decision is sought to be reviewed by this Court on certiorari.

The Hon. Dr. Hu Shih has since replaced the Hon. Chengting T. Wang as Ambassador of the Republic of China to the United States, and so has been substituted as appellee by stipulation (R. 355).

IV.

SPECIFICATION OF ERRORS.

The questions involved are set out in the petition proper. To elaborate upon them and define petitioner's position more precisely, it is specified that the Circuit Court of Appeals erred in holding:

1. That a foreign government can expropriate and take possession of a privately owned vessel after libel and process *in rem* have been filed and served, and then divest the District Court of jurisdiction by claiming governmental immunity for the vessel.

2. That no jurisdiction was obtained by the District Court over ship or cargo by a "formal seizure", without a keeper remaining continuously aboard the vessel.

3. That the Republic of China was entitled to claim governmental immunity for the vessel when the libel did not ask for possession or sale of the ship, but simply for return of libelant's cargo from its holds.

SUMMARY OF ARGUMENT.

We shall present our argument under three main headings, corresponding in order and substance to the questions stated in the petition and to the specifications of error listed above. A summary of the entire argument is this: That *in rem* jurisdiction had attached before the Chinese Government expropriated the vessel, and that the claim of governmental immunity cannot divest the District Court of its previously acquired jurisdiction, nor can governmental immunity be urged where no claim is asserted against the vessel or the Chinese Government.

POINT I.

WHERE A FOREIGN GOVERNMENT ACQUIRES TITLE TO AND POSSESSION OF THE RES SUBSEQUENT TO FILING OF LIBEL AND SERVICE OF PROCESS, NO GOVERNMENTAL IMMUNITY CAN BE CLAIMED.

As a general rule, vessels owned by a friendly foreign state are exempted from the *in rem* jurisdiction of our admiralty courts. *Berrizi Bros. v. SS*

Pesaro, 271 U.S. 562, 70 L. Ed. 1088. It is also true that, as was done here, a foreign government may expropriate a vessel belonging to one of her nationals and have her Consul take over the vessel while it lies in an American port. *Ervin v. Quintillana,* 99 F. (2d) 935 (5th Cir.).

This doctrine of sovereign immunity is based upon a policy of international comity and respect for the sovereign dignity of friendly nations. *Berrizi Bros. v. SS Pesaro,* supra. But in all cases in which the doctrine has been applied, the foreign state was the owner of the vessel at the time the libel was filed. No case holds that, when a libel has been filed and process served, a foreign government can divest the District Court of jurisdiction by *subsequently* expropriating the ship and claiming immunity for her.

The precise question here presented has never been decided before, but it is submitted that, upon reason and principle, an expropriation by the Republic of China subsequent to filing of libel and service of process cannot oust our Courts from a previously acquired jurisdiction. The dignity of our own judicial bodies and processes is of equal importance with that of another sovereign. Where the jurisdiction of our Court has first attached, it must and should be protected.

The filing of the libel and the service of process in this action did not impair the sovereign dignity of the Chinese Republic nor disturb its title or right to possession of the vessel, for at that time the vessel was owned by a private corporation and was in charge of

its employees. The reason for the rule not being present, we submit that the rule no longer applies.

We do not understand that the opinion of the Circuit Court of Appeals squarely decides this question adversely to our present contention. That opinion avoids this issue by ruling that no valid jurisdiction was acquired before the expropriation took place.

In other words, the Circuit Court decided that, even though a subsequent expropriation cannot interfere with a previously acquired jurisdiction, that rule was inapplicable here, because no *in rem* jurisdiction had been acquired, i. e., that the service of process in this case was defective, and was insufficient to subject ship or cargo to the jurisdiction of the admiralty court.

This brings us to the question of whether or not the service of process was effective, which is set out as question 2 in the petition itself, and which is argued under the next heading.

POINT II.

BOTH CARGO AND VESSEL HAD BEEN SUBJECTED TO THE JURISDICTION OF THE DISTRICT COURT PRIOR TO THE EXPROPRIATION OF THE VESSEL BY THE REPUBLIC OF CHINA.

The facts as to what was done before the expropriation to secure jurisdiction over the cargo and ship are these:

On April 22, 1938, a verified libel *in rem* was filed by the Bank on the admiralty side of the District Court, to recover possession of its scrap iron (R. 2-7).

This libel named as respondent "2100 tons of melting scrap on board the SS Edna Christensen". It prayed (R. 5-6) for process against the cargo and that all interested persons be cited to appear. It also prayed for delivery of the scrap to libelant, and that the Court make such order as to the vessel's movements as would be appropriate and necessary to obtain a discharge of the cargo from her holds.

The monition (R. 7-9) was issued the same day as the libel was filed. It named the respondent in the same fashion as the libel (i. e., as scrap iron aboard the vessel) and commanded the Marshal to attach and retain the same and give notice to persons claiming an interest therein.

On April 23, 1938, a deputy Marshal boarded the vessel with an interpreter hired by libelant. The interpreter read the libel in Chinese to the second officer, who was the highest ranking officer then on board. The deputy handed to the second officer a copy of the monition and a copy of the libel, and tacked a notice of seizure onto the cabin wall, below a similar notice which had previously been tacked there in an action *in rem* against the vessel (R. 84-93).

The hatches remained battened down during this time, and the deputy did not see the scrap nor affix a notice of seizure to the scrap itself, but it was stipulated that the scrap was then in the vessel's holds (R. 93).

After these acts had been done, the deputy and the interpreter left the vessel without leaving a "keeper" on board (R. 91-92.)

The Circuit Court of Appeals has held that this "formal seizure" (as it is called in practice) was ineffective to bring ship or cargo within the jurisdiction of the District Court, on the ground that the Marshal must seize and take the *res* into his possession to establish *in rem* jurisdiction. The Circuit Court, in so holding, admitted (R. 351) that earlier cases cited by libelant were contrary to its holding, and distinguished some of those cases upon a ground not mentioned in the decisions themselves. In so doing, the Circuit Court cited several cases, including the case of *Pelham v. Rose,* 9 Wall. 103, 19 L. Ed. 602.

Although the cases relied upon by the Circuit Court use language indicating that physical seizure is necessary to acquire jurisdiction, none of them is a *holding* to that effect, and none of them involved a "formal seizure" such as was made here.

The case of *Taylor v. Carryl,* 20 How. 583, 15 L. Ed. 1028, merely held that the attempted seizure by the Marshal was invalid where the vessel was already under attachment in a State Court suit and so had been subjected to the jurisdiction of the State Court.

In *Bruce v. Murray,* 123 Fed. 366, the plaintiff filed suit on the equity side of the lower court to foreclose a mortgage on a ship and served the defendant with summons. Subsequently, by amendment, plaintiff attempted to join *in rem* admiralty claims for crew's wages, labor and supplies, without taking out or serving any admiralty process at all.

In *Brennan v. The Anna P. Dorr,* 4 Fed. 459, the Marshal merely served a copy of the writ on one of

the part owners and on the wife of the master at the latter's shore residence. No service of any kind was made upon the ship.

In *The Merrimac,* 242 Fed. 572, again no service of process whatever was even attempted upon the vessel.

In *The Rio Grande,* 23 Wall. 458, 23 L. Ed. 158, the Marshal released the seized vessel upon the order of the District Court, and the question was whether a decree in favor of the libelant upon a subsequent appeal was valid despite that release. The Court held that it was, and went on to say:

> "We do not understand the law to be that an actual and continuous possession of the vessel is required to sustain the jurisdiction of the court. When the vessel was seized by the order of the court and brought within its control the jurisdiction was complete. A subsequent improper removal cannot defeat that jurisdiction" (90 U.S. at p. 463, 23 L. Ed. at p. 159).

Pelham v. Rose, 9 Wall. 103, 19 L. Ed. 602, on which the Circuit Court relied so heavily, involved a condemnation of a note as alien property under a Civil War statute. It properly held that actual seizure of the note was necessary, because the note was a negotiable instrument which could otherwise be transferred to a holder in due course. As the Supreme Court pointed out, also, the statute there involved required seizure of enemy property before a condemnation proceeding could even be filed.

Criscuolo v. Atlas Imperial Diesel Engine Co., 84 F. (2d) 273 (9th Cir.) merely upset the sale of a

vessel for invalidity of procedure in publishing notice, and the language about the necessity of seizure was dictum, only.

The cases directly passing on the necessity of actual physical possession and retention of the *res* hold uniformly that no such action is required to obtain jurisdiction over the *res,* but that service of notice on the holder of the property is sufficient.

In *Snow v. 180 Tons of Scrap Iron,* 11 Fed. 517 (D.R.I.), a libel *in rem* was filed against cargo in the possession of a corporation. Process was served upon the president of the corporation, but no physical seizure of the scrap was even attempted. The question of jurisdiction was raised by the corporation, and the Court upheld the *in rem* jurisdiction over the iron, saying, at page 519:

> "The question, then, under the exceptions, narrows itself down to this: whether it is necessary to the maintenance of a proceeding in rem, by libel and monition, for the officer to actually find the property upon which to make service and to actually take it into his possession, or whether a monition served upon the holder of the property or of the proceeds is sufficient. * * *
>
> And in this country notice of the action in rem is often served by a simple monition, where there is no danger of loss and it is desirable to save the expense of custody. *Flaherty v. Doane,* 1 Low. 148, 151:
>
> A libel in rem may be a proceeding against the property by arrest or attachment; but it does not follow that an attachment can only be made by

> actually taking possession of the property. Service may be made either by notice or by actual levy on the goods.
>
> 'An attachment may be made of goods and chattels, or of rights and credits, and by actual arrest of the goods, *or by notice to the person having either or both in his possession*' " (Court's italics).

In *Flaherty v. Doane,* 1 Low. 148, 9 Fed. Cas. No. 4849 (1867—D. Mass.), cited in the foregoing case, seamen were allowed, in an action in *personam* against persons *not* liable, to recover wages against the proceeds of the vessel in respondent's hands, based upon *in rem* rights against the *vessel* and its *proceeds.* The Court discusses the English practice of allowing actions *in rem* upon monition to the owner of the libelled ship without seizure of the vessel, and says:

> "The practice is not unknown in this country. We often require notice of the action in rem to be served by a simple monition, where there is no danger of loss by that form of procedure and it is desirable to save the expense of custody."

In *250 Tons of Salt,* 5 Fed. 216 (S.D.N.Y.), a libel *in rem* was filed against cargo to collect freight charges. Part of it was in the customs warehouse pending collection of import duties. Process was served by leaving a copy with the storekeeper and the collector of customs, and then the Marshal himself raised the question of jurisdiction. The Court decided that valid jurisdiction *in rem* had been obtained over the cargo,

and that a sale could be decreed, subject to the superior lien of the United States for customs duties.

In *Jorgenson v. 3173 Casks of Cement,* 40 Fed. 606, (E.D.N.Y.), the goods proceeded against were in the customs collector's storehouse. The Marshal served process *in rem* by tacking a notice on the goods in the warehouse. Thereafter the warehouse was never opened and the Marshal never again saw the goods. Three times a day a deputy called at the warehouse to ascertain from the man in charge that the goods were still there. In a proceeding to tax as costs the fees for these daily calls, the Court held that this was a valid seizure of the property, and that the Marshal had legal custody, although the collector and his agents were *not* "keepers" for the Marshal.

In *The Whippoorwill,* 52 F. (2d) 985 (D. Md.), a yacht was in the custody of the Coast Guard after seizure for a violation of the revenue laws. Before the government could begin a condemnation proceeding, a libel was filed against the yacht and monition was served by a "formal seizure", as in the case at bar.

The vessel was sold after default had been entered, but the sale was upset at the instance of the government. The Court did *not* upset the sale because of any supposed inadequacy of the formal seizure, but did so on the ground that the navigation and customs statutes provided an exclusive remedy, and that the only action which could be maintained after seizure by the authorities was a condemnation libel by the government, in which all interested parties could intervene.

By failing to base its decision on the inadequacy of the formal seizure, the Court in that case tacitly approved such a method of service as a valid mode of acquiring jurisdiction over the *res*.

The English practice in libels *in rem* against vessels or cargo is simply to affix a copy of the process to the vessel. *Roscoe's Admiralty Practice* (5th Ed., 1931), pp. 277-288.

We submit that all that is necessary is an open and definite assertion of jurisdiction by the Court in such manner that the pendency of the action will come to the attention of anyone in charge of the *res* or dealing with it. The service made in this case satisfied every reasonable requirement. The officer in charge of ship and cargo had the libel read to him and received a copy of the libel and monition, while a public notice of seizure was affixed in a conspicuous place upon the vessel, where it could be seen by anyone coming aboard.

Also in point is the line of cases holding that jurisdiction acquired by seizure is not divested by the loss of physical custody thereafter. In each of the following cases jurisdiction over the *res* was held to continue despite the absence of a "keeper" or other representative of the Marshal. *The E. W. Gorgas,* 8 F. Cas. No. 4585 (1879, S.D.N.Y.); *U. S. v. The Little Charles,* 26 F. Cas. No. 15,612 (1818, C. C. Va.); *The Circassian,* 5 F. Cas. No. 2721 (1866, E.D.N.Y.); *The Joseph,* 13 F. Cas. No. 7537 (1843, D. Conn.); *The C. W. Cowles,* 124 Fed. 458 (N. D. Ia.).

In this case, as we have seen, the deputy Marshal boarded the vessel and was there for some time (R. 93) serving the monition, tacking up notice of seizure, and having the libel read in Chinese. During that time he was in actual physical control of the vessel and the cargo, and was himself the "keeper" while he remained aboard. This *was* an "actual seizure" to all intents and purposes. No other act was necessary and, if a keeper had been left on board, no question could have been raised.

But, as the cases last cited expressly hold, the failure to maintain continuous physical custody of the *res* after seizure does not affect the jurisdiction of the Court.

We submit that a valid service of process was made upon the scrap, and that it was properly subjected to the jurisdiction of the District Court on April 23, 1938.

It is our further contention that the vessel itself also came incidentally within the jurisdiction of the District Court, at least to the extent that the Court had the power to order the ship to moor at the dock, to open her hatches, and to allow the use of her winches to discharge the cargo.

It is true that the libel was against the scrap only. However, the scrap was aboard the vessel and was so described in the libel (R. 2) and the monition (R. 7-8). The libel prays (R. 6) for an order compelling the vessel to facilitate the discharge of the scrap. When the vessel and her senior officer were served, she was,

in effect, subjected to the jurisdiction of the Court as a sort of garnishee.

Also, at the time of this service, the ship had already been subjected to a formal seizure in a suit against the vessel *in rem* (R. 10) and was thus already in the Court's jurisdiction.

We have found no cases dealing with the precise question of the effect upon a ship of service on the ship in a possessory libel against cargo in her holds. However, the authorities allow a libel *in rem* against cargo only, and in any such libel the goods will necessarily be in a vessel or warehouse. If service is made upon the holder, jurisdiction must be held to have been acquired over him, at least to the extent that the Court can compel him to relinquish the goods if he makes no claim to them.

In a suit at law a person not named as defendant can be garnisheed or attached and thereby subjected to the Court's jurisdiction as to property of the defendant held by the garnishee. In this case the vessel was the custodian of the libeled cargo, and the vessel was served, as set forth above. We submit that jurisdiction over ship and cargo was obtained by the service of April 23, 1938.

POINT III.

THE CLAIM OF GOVERNMENTAL IMMUNITY IS NOT AVAILABLE IN THIS CASE.

It is our present contention that, even if the service of process on April 23, 1938, was invalid and ineffective, the claim of governmental immunity should not be allowed.

It is true that the case of *Berrizi Bros. v. SS Pesaro,* 271 U.S. 562, 70 L. Ed. 1088 (supra), states that, under the rule of sovereign immunity, the District Court has no jurisdiction. This, however, is not so stated in the statutes, but is a limitation imposed by the Courts upon themselves. It has been so imposed because, as we have already noted, it is felt that no friendly government should be suable in our Courts, and that this exemption should extend to vessels or other property owned by such governments.

In other words, the exemption is granted by the Courts as an international courtesy and, in a sense, it lies within the discretion of the admiralty Court to grant or deny the privilege.

> "Vessels of a foreign nation are within the jurisdiction of United States admiralty Courts in the sense that the United States, through its Courts, has power to adjudicate with respect to such vessels, but they are ordinarily accorded immunity from process as a matter of international comity."
>
> (2 *C. J. S.* 82.)

The exemption is not a blanket one from any and all control or regulation by the laws of this country. Foreign vessels, though owned by their governments,

are still subject to control and regulation in the enforcement of our navigation, customs and health laws.

More pertinent still is the rule that property owned by a foreign nation is still subject to judicial process in United States Courts if it is not in the actual possession of that nation's representatives. *The Davis,* 10 Wall. 15, 19 L. Ed. 875; *Long v. Tampico,* 16 Fed. 491 (S.D.N.Y.); *Johnson Lighterage Co. No. 24,* 231 Fed. 365 (D.N.J. 1916).

In other words, the exemption or privilege is granted only where the judicial proceeding will deprive the foreign government of possession, which, it is supposed, would be an affront to the dignity of a sister nation. In every case where sovereign immunity has been granted, it will be found that the libel or other action sought to establish a claim to or against the property, and to have the property sold to enforce the libelant's rights. This would permanently deprive the foreign nation of title and possession, and has been refused by our Courts.

In the instant case no such remedy is sought and no such discourtesy to another nation is involved. The libel does not name the vessel as a respondent, and does not ask possession or sale of the ship. The libel asserts no interest in the ship and makes no claim against it or against the Republic of China. The libel is against the cargo only, and the Chinese Ambassador's intervention does not claim any interest in the cargo or deny libelant's title to the scrap.

The only relief sought against the vessel is an order that she moor at a wharf and allow workmen (at

libelant's expense) to open her hatches and unload the scrap, using the vessel's winches if necessary. This will not deprive the Chinese Government of title or possession, but will merely restore to libelant what the Chinese Government admits to be libelant's—the cargo of scrap.

The instant case, therefore, is not like the cases where the doctrine of sovereign immunity has been previously applied, and the decision of the Circuit Court of Appeals extends that doctrine to a new field where the reasons for the rule are by no means so cogent. We submit that such an extension of the rule is unwarranted and unjust.

We have thus far conceded that the case of *Berrizi Bros. v. SS. Pesaro,* 271 U.S. 562, 70 L. Ed. 1088 (supra), decides that the doctrine of sovereign immunity (which was first applied to warships) should apply to *merchant* vessels owned by a foreign nation.

We do not agree with the reasoning of that decision, however, and we feel strongly that the rule might well be reexamined.

In the world of trade and commerce the prompt performance of obligations and the legal enforceability of them is vital to the doing of business. An undue hardship is imposed on innocent shippers if a vessel owned by a foreign government can claim immunity for its failure to live up to its responsibilities. When a nation enters into world wide commerce with its own ships, it should be subjected to the same re-

quirements of fair dealing that are imposed upon personal and corporate shipowners.

In the present state of world trade it is apparent that more and more ocean commerce will be performed by nationally owned ships, and the doctrine of the *Berrizi* case will, if adhered to, cause more and more hardship to private shippers and consignees in this country.

For these reasons we submit that the rule of the *Berrizi* case is no longer sound or desirable, and that the question of sovereign immunity for merchant vessels owned by other countries should be realistically examined in the light of present conditions, so that such a precedent will not work injustice and hardship in future cases. At least the rule should not be extended to a case like the one at bar, where the relief sought will not deprive the foreign government of title or possession.

Upon the foregoing considerations, we ask this Court to issue its Writ of Certiorari, and to reverse the decision of the Circuit Court of Appeals.

Dated, San Francisco, California,
September 3, 1940.

Respectfully submitted,
CARROLL SINGLE,
Counsel for Petitioner.

STANLEY J. COOK,
Of Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 406

YOKOHAMA SPECIE BANK, LTD.
(a corporation),
Petitioner,

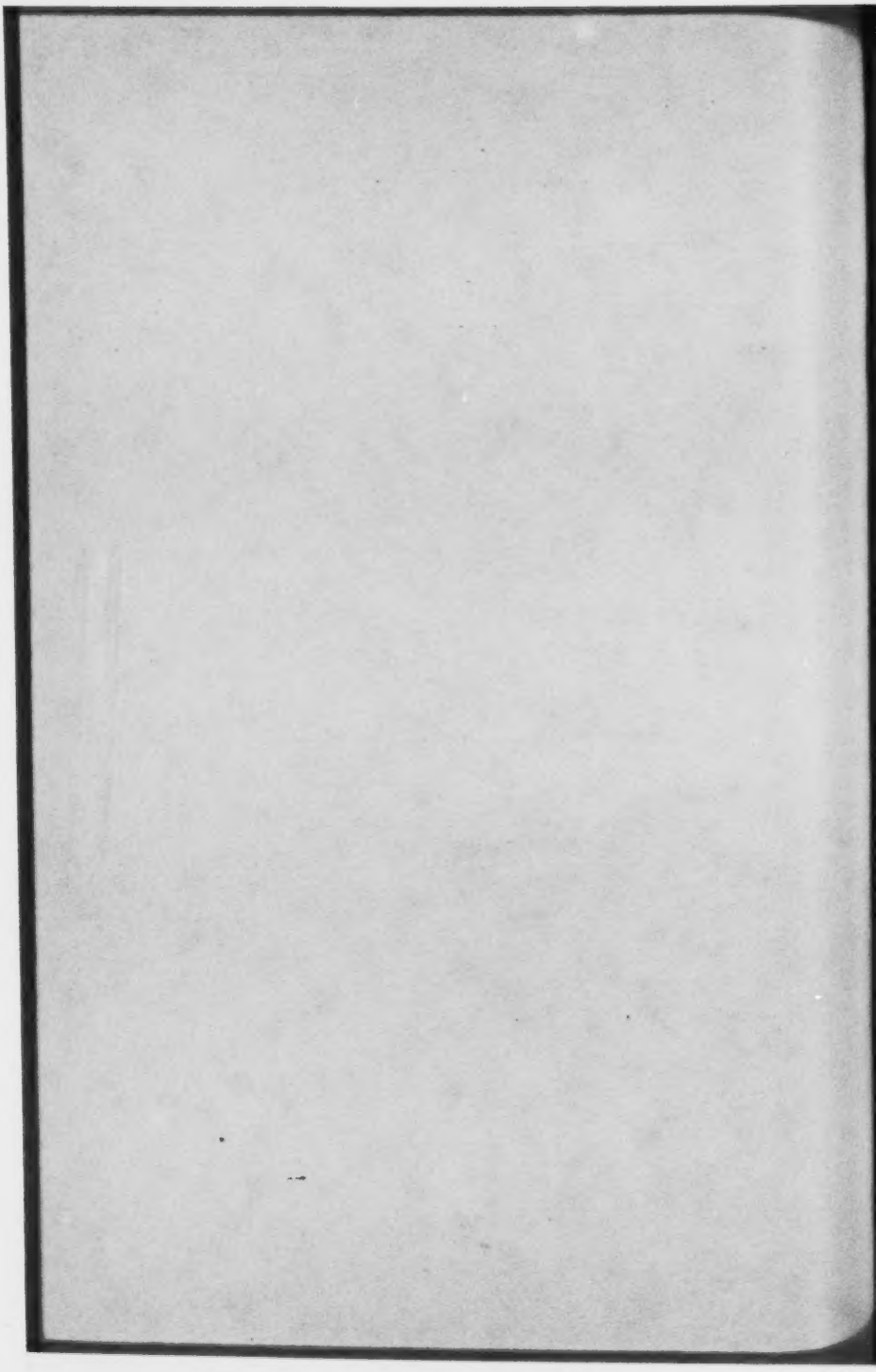
vs.

DR. HU SHIH, The Ambassador of the Republic of China to the United States of America,
Respondent.

BRIEF IN BEHALF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

LYMAN HENRY,
Merchants Exchange Building, San Francisco, California,
HUGH K. MCKEVITT,
JACK HOWARD,
Russ Building, San Francisco, California,
FREDERICK W. DORR,
ARCHIE M. STEVENSON,
Merchants Exchange Building, San Francisco, California,
Counsel for Respondent.

BARNES-WALSH PRINTING CO., SAN FRANCISCO



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STATEMENT OF CASE.

Petitioner's statement of the case is correct, with the exception that the interpreter, who was in petitioner's employ, *purportedly,* rather than actually, read the libel to the second officer. The interpreter was not produced at the trial, and the Deputy Marshal did not speak Chinese (R. 92).

The case urged by petitioner is not the one presented by the record. Petitioner contends that the jurisdiction of the District Court attached prior to the expropriation of the vessel by the Republic of China. It is apparent both from an examination of the decision of the Circuit Court of Appeals and the record that the District Court never had jurisdiction over either the vessel or the cargo stowed thereon. The vessel was not a party to the cause. The Marshal never attempted to seize it. Furthermore, the Court never acquired jurisdiction over the cargo because the Marshal, acting under instructions from petitioner, did not take the requisite steps for the Court to acquire jurisdiction. Inasmuch as the Court had neither jurisdiction over the ship nor the cargo, it could not control the movements of the vessel or its gear in the face of the claim of sovereign immunity asserted by the Republic of China after it had expropriated the vessel validly.

An examination of the decision of the Circuit Court of Appeals shows clearly that it is in accordance with the decisions heretofore rendered by this Court. The decision is not in conflict with the decisions of this Court or of any Circuit Court and it involves no unusual or important point.

Petitioner attempted to gain possession of a cargo of scrap iron stowed on board a vessel owned by a friendly foreign power. Furthermore, petitioner sought to control the movements of that vessel, to interfere with its management, and to use its gear and equipment for its own purposes.

ARGUMENT.

I. A NATIONAL VESSEL OF A FRIENDLY FOREIGN SOVEREIGN IS NOT SUBJECT TO THE JURISDICTION OF THE COURTS OF THE UNITED STATES.

It cannot be disputed that a national vessel of a friendly sovereign is not subject to the jurisdiction of the Courts of the United States, and is entitled to claim immunity.

Berizzi Brothers Co. v. Steamship "Pesaro", 271 U.S. 562, 70 L. Ed. 1088.

Even though appellant was the legal owner of the cargo, it had no right to enforce its possession by a decree from a United States Court, if it could not gain possession without interfering with the movements of a national vessel of a friendly foreign sovereign.

In *The Siren*, 7 Wall. 152, 19 L. Ed. 129, the Supreme Court said (pp. 156-8):

> "The inability to enforce the claim against the vessel is not inconsistent with its existence.
>
> * * * * * * *
>
> Even where claims are made liens upon property by statute, they cannot be enforced by direct suit, if the property subsequently vest in the government.
>
> * * * * * * *
>
> A mortgage upon property, the title to which had subsequently passed to the United States, would be in the same position as a claim against a vessel of the government, incapable of enforcement by legal proceedings.
>
> * * * * * * *
>
> The authorities to which we have referred are sufficient to show that the existence of a claim,

and even of a lien upon property, is not always dependent upon the ability of the holder to enforce it by legal proceedings."

II. THE VESSEL WAS NOT WITHIN THE JURISDICTION OF THE COURT.

Petitioner recognizes that the vessel was expropriated validly by the Republic of China, but contends that the jurisdiction of the District Court had attached prior to the expropriation, and therefore the Republic of China was not entitled to assert its claim of sovereign immunity to prevent the District Court from controlling the movements of the ship and its gear.

Actually, as pointed out by the Circuit Court of Appeals the vessel was never within the jurisdiction of the District Court, because it was not a party to the cause and the Marshal had never attempted to seize it.

Petitioner subtly interweaves in its argument, without the citation of a single authority, the contention that the Court had jurisdiction over the "Kwang Yuan", because of the purported seizure of the cargo.

It is elementary that, without a seizure, the vessel was not in the possession of the Court, or under its jurisdiction, and therefore the Court could not control its movements or its equipment.

In *Criscuolo v. Atlas Imperial Diesel Engine Co.*, 84 F. (2d) 273 (C.C.A. 9), the Court said (p. 275):

> "To obtain jurisdiction to proceed to a decree in rem in admiralty, there are two essential requirements. First, the vessel must come into the possession of the court by seizure under adequate warrant of arrest."

In the instant case the *vessel* was not in the possession or under the jurisdiction of the Court at the time the "Kwang Yuan" was expropriated and therefore no conflict ever arose between the jurisdiction of the Courts of the United States and the sovereignty of the Republic of China. The claim of sovereign immunity arises not as to the cargo but as to the vessel. The vessel having been expropriated, and the decree of expropriation having been effected by the acquiring of possession of the vessel, peaceably and without conflict with any jurisdiction of the Court, expropriation became complete. After the act of expropriation, the Court could not interfere with the possession of a friendly foreign sovereign.

III. THE CARGO WAS NOT WITHIN THE JURISDICTION OF THE COURT.

However, the Court did not have jurisdiction even over the cargo of scrap iron because the Marshal did not make any seizure of the cargo or take it into his possession. From the record, it is clear that the Deputy Marshal merely went on board the ship, handed the monition to the second officer, tacked a copy on the saloon bulkhead, listened while an alleged in-

terpreter (hired by petitioner) purportedly read the monition to the second officer (R. 84, 92), and then left the vessel. The Deputy Marshal did not see the cargo (R. 93) and did not attempt to exercise any control over it or attach a copy of the monition in the vicinity of the holds where the cargo was stowed (R. 90-1, 93). The Deputy Marshal did not even ascertain that there was any cargo on board (R. 93). No keeper was left on board (R. 91) and none of the ship's officers or crew was placed in charge of the cargo as the representative of the Marshal. Nothing whatever was done by the Deputy Marshal to exercise possession or control over the cargo.

Admiralty Rule 10 of the United States Supreme Court (28 U. S. C. A. 723, p. 393) and Admiralty Rule 9 of the Rules of Practice of the United States District Court, for the Northern District of California, provide in part as follows:

> "In all cases of seizure, and in other suits and proceedings in rem, the process, if issued and unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, * * *."

Webster's New International Dictionary, Second Edition, defines "seizure" as "a taking into possession".

Here the Marshal did not take the scrap iron into possession in the remotest degree.

In *The Rio Grande,* 23 Wall. 458, 23 L. Ed. 158, the Supreme Court said (p. 464):

> "* * * it follows that to give jurisdiction *in rem* there must have been a valid seizure and an actual control of the ship by the marshal of the Court; * * *."

In *Taylor, et al. v. Carryl,* 20 How. 583, 15 L. Ed. 1028, the Court said (pp. 599-600):

> "But it follows, that to give jurisdiction *in rem,* there must have been a valid seizure and an actual control of the ship by the marshal of the court, and the authorities are to this effect."

In *Pelham v. Rose,* 9 Wall. 103, 19 L. Ed. 602, the Court said (p. 106):

> "The seizure of the property, as thus seen, is made the foundation of the subsequent proceedings. It is essential to give jurisdiction to the court to decree a forfeiture. Now, by the seizure of a thing is meant the taking of a thing into possession, the manner of which, and whether actual or constructive, depending upon the nature of the thing seized. As applied to subjects capable of manual delivery, the term means caption; the physical taking into custody."

In *Bruce v. Murray,* 123 F. 366 (C.C.A. 9), the Court said (p. 371):

> "To give jurisdiction in rem the subject proceeded against must be within the jurisdiction of the court, and there must be an actual seizure and control of the res by the marshal; otherwise, the admiralty court has no jurisdiction."

In *Hale v. Henkel,* 201 U. S. 43, 50 L. Ed. 652, Justice McKenna, in a concurring opinion, said (p. 80):

> "It is said 'a search implies a quest by an officer of the law; a seizure contemplates a forcible dispossession of the owner.' "

In *Brennan v. Steam-Tug Anna P. Dorr,* 4 F. 459 (W. D. Pa.), the Court said (pp. 459-62):

> "The facts of the case, as they now appear to the court, are as follows: On October 27, 1875, Patrick Brennan, an owner of the one-fourth of said tug, filed a libel *in rem* for her sale, and the division of the proceeds between himself and his co-owners, Christian & Carse. To the process which then issued the marshal made a return in these words: 'November 3, 1875, attached the steam-tug Anna P. Dorr, her tackle, apparel, furniture, etc., by serving a copy of this writ, personally, on John Carse, part owner of same, and by serving, November 5, 1875, a copy of this writ at residence of Capt. E. F. Christian on wife.'
>
> * * * * * * *
>
> From the evidence now before the court it appears that the marshal did not arrest or take possession of the tug by virtue of said process. He was instructed by the libellant's proctors not to arrest her, but simply to serve a copy of the writ upon Christian & Carse, and these instructions he obeyed. At the time the libel was filed the tug was in the possession of Christian, and she remained in his possession as fully after the service of the writ as before; and down until May 12,

1877, the tug was run by Christian in and about the harbor of Erie, and upon the lake, in her ordinary business. During all this time no further step was taken in this suit.

* * * * * * *

In *Miller v. United States,* 11 Wall. 294, it is said: 'In revenue and admiralty cases a seizure is undoubtedly necessary to confer upon the court jurisdiction over the thing when the proceeding is *in rem.* In most of such cases the *res* is movable personal property, capable of actual manucaption. Unless taken into actual possession by an officer of the court, it might be eloigned before a decree of condemnation could be made, and thus the decree would be ineffectual. It might come into the possession of another court, and thus there might arise a conflict of jurisdiction and decision if actual seizure and retention of possession were not necessary to confer jurisdiction over the subject.'

In the present case it is certain that there was no actual seizure of the tug by the marshal under the original process issued out of this court. Acting in accordance with the express instructions of the libellant the marshal did not seize the tug, but, with the acquiescence of all the parties in interest, she remained in the possession of Christian. Of this, I may here say, none of the owners, under the circumstances of the case, have any right to complain.

But it is said that the marshal's return shows an attachment of the vessel. I do not think so. True, the language of the return is, 'attached the steam-tug Anna P. Dorr.' But how? 'By serving a copy of this writ personally on John Carse,

> part owner of same, and by serving, November 5, 1875, a copy of this writ at residence of Captain E. F. Christian on wife.' But such service of the writ was not an attachment or seizure of the vessel."

In *The Merrimac,* 242 F. 572 (S. D. Fla.), the Court said (p. 574):

> "It is beyond question, I imagine, as said by Judge Locke, in The Nora (D. C.), 181 Fed. 845, that 'the jurisdiction in actions in rem is only given by attachment and bringing the vessel into the custody of the court, and no valid decree can be entered without such attachment.' In the instant case, as above noticed, no attachment was ever served. The vessel was never taken into custody, and hence no decree *in rem* could be entered in this suit."

Since the District Court did not have possession of the *vessel* at any time under any theory, the District Court had no power to order the "Kwang Yuan" moved after it had been expropriated and the claim of sovereign immunity had been asserted.

The cases cited in petitioner's brief are not in conflict with the above authorities. The majority of petitioner's authorities fall into two classifications: First, those in which the goods, at the time of the seizure, were already in the possession of a public official; in this class are *250 Tons of Salt,* 5 F. 216 (S.D.N.Y.), and *Jorgensen v. 3173 Casks of Cement,* 40 F. 606 (E.D.N.Y.); and, second, those in which the marshal *originally* had possession of the property and the

Courts held merely that the "continuance of possession" did not affect the validity of seizure. Such cases are *The E. W. Gorgas,* 8 Fed. Cas. No. 4585 (1879 S.D.N.Y.); *United States v. The Little Charles,* 26 Fed. Cas. No. 15,612 (1818 Circ. Ct. D. Va.), *The Circassian,* 5 Fed. Cas. No. 2721 (1866, 1867 E.D.N.Y.) and *The Joseph Gorham,* 13 Fed. Cas. No. 7537 (1843 D. Conn.).

In *The C. W. Cowels,* 124 F. 458 (N.D. Ia.), it appears that the marshal appointed the tow boat captain as his *agent,* and the Court held that the tug remained in the marshal's possession although under the control of his agent. The case is of no help in the instant matter.

It does not appear from the decision of *The Whippoorwill,* 52 F. (2d) 985 (D. Md.), that the question involved here was raised in that case. How the Court would have decided the point, if it had been urged, is mere conjecture. Therefore, the case is not an authority for the proposition stated by petitioner.

The Court, having no jurisdiction over the ship or cargo, was unable to make any valid order in the cause even if respondent had not asserted the claim of sovereign immunity. Certainly when the Republic of China intervened and set up this defense, the Court could not order the vessel moved and its gear and equipment used to unload the cargo.

Finally, petitioner contends that the doctrine of sovereign immunity should not be applied to this case because the sovereign's possession and control will be

disturbed only slightly. The rule is not so limited. The sovereign, under the decisions, is entitled to absolute immunity. Any order of the United States Courts that would interfere with the movements of a national vessel or would order the Marshal to move the vessel and use its equipment would interfere with the sovereign rights of a friendly foreign power.

As the United States District Court said in *The Luigi,* 230 F. 493 (E.D. Pa.) at page 496:

> "It is far more important for the courts of the United States to recognize the international rule of comity that an independent sovereign cannot be personally sued, * * * than it is to take cognizance of private rights, if, by so doing, that rule is violated."

It is respectfully submitted that the application for certiorari should be denied.

Dated, San Francisco, California,
October 4, 1940.

LYMAN HENRY,
HUGH K. MCKEVITT,
JACK HOWARD,
FREDERICK W. DORR,
ARCHIE M. STEVENSON,
Counsel for Respondent.